No. 22165

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETER ANTHONY NOGA

APPELLANT,

v.

UNITED STATES OF AMERICA

APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF AND APPENDIX FOR APPELLANT

HOBERG, FINGER, BROWN & ABRAMSON
By JAMES D. MART
703 Market Street
San Francisco, California 94103

ATTORNEYS FOR APPELLANT

FILED

AUG 2 0 1968

WM. B. LUCK CLERK

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases:

Constitution and Statutes:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22165

PETER ANTHONY NOGA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF AND APPENDIX FOR APPELLANT

PRELIMINARY STATEMENT

Little need be stated in reply to the argument contained in appellee's brief. Appellant's position with regard to the points raised has been amply stated heretofore in appellant's opening brief. Certain points bear emphasis.

ARGUMENT

Appellee asserts that the exclusive remedy provision of the Federal Employees Compensation Act is unyielding in all conceivable circumstances and cannot be subject to construction and interpretation despite potential conflict with subsequently enacted statutes. While it has been consistently stated in the past that the F.E.C.A. is the exclusive

remedy provided to an injured government employee, no appellate decision has been discovered involving the construction and interpretation of the F.E.C.A. exclusive remedy provision under a situation such as presented by the subsequent enactment of the Federal Drivers Act which shifts responsibility to the United States from the negligent government driver. Certainly, it does not follow that there cannot be a meritorious exception in light of the unusual and novel circumstances here presented. In no other way may an incongruous, absurd and unconstitutional result be avoided.

In order to have semblance of validity, appellee must circumvent the clear dictate of the Supreme Court in Jackson v. Lykes Bros. Steamship Co., 386 U S. 731, 18 L. ed 2d 488, 87 S. Ct. 1419 (1967), and in Reed v. Steamship Yaka, 373 U.S. 410, 10 L. ed 2d 448, 83 S. Ct. 1349 (1963). In Jackson and Yaka, the traditional humanitarian remedy against the employer-owner for unseaworthiness of its vessel was held not to be barred by the exclusive remedy provision in the Longshoremen's Act providing workmen's compensation. It was said that such an interpretation and construction would bring about an "incongrous, absurd and unjust result" whereby recovery in tort depended fortuitously upon the kind of employment contract involved. Appellee seeks, without merit, to distinguish Jackson and Yaka because these cases dealt with the rights of maritime employees as against private employers. Certainly, there can be no less reason to avoid an "incongruous, absurd and unjust result" in determining the application of a congressional Act effecting the rights of employees as against the United States as an employer. The opposite should be true.

Appellee argues further that Jackson and Yaka cannot apply because of Aho v. United States, 374 F. 2d 885 (5th Cir. 1967), holding that government seamen cannot recover against the United States except under the F. E. C. A. But Aho does not involve the type of situation presented in either Jackson and Yaka or in the instant case. Before the enactment of a workmen's compensation system for government seamen, there was no remedy against the United States because of the doctrine of sovereign immunity. See Aho v. United States, 272 F. Supp. 990. The subsequent enactment of a system providing compensation as an exclusive remedy against the United States as the employer of seaman, does not destroy any traditional remedy against the United States for unseaworthiness because none existed to be destroyed. But in Jackson and Yaka, a remedy did exist against the private employer for unseaworthiness before the Longshoremen's Act was enacted. As a result these seamen were deprived of something. The same deprivation exists with appellant. Government employees had a traditional common law remedy in tort against a fellow employee before the enactment of the Federal Drivers Act in 1961. See Allman v. Hanley, 302 F. 2d 599 (5th Cir. 1962) and Marion v. United States, 214 F. Supp. 320 (Md. 1963). As to appellant, it is obvious that the application of the exclusive remedy provision would bring about an "incongruous, absurd and unjust result" founded upon mere fortuity.

Application of the exclusive remedy provision of the F. E. C. A. would, in this case, bring about even more shocking results than that in Jackson or Yaka because it violates the constitutional guaranty of due process under the Fifth Amendment to the Federal Constitution and

and abrogates a judicial remedy by implication.

Appellee seeks summarily to dispose of the constitutional grounds.[1] Appellant does not disagree with the proposition that due process is not violated by a statute which replaces a common law tort remedy with workmen's compensation benefits(or another reasonably just equivalent). But appellee urges that the Federal Drivers Act does more than replace the common law tort remedy; for he urges that it completely abrogates it. It is noteworthy that the case relied upon by appellee, <u>New York Central R R. Co. v. White</u>, 243 U. S. 188, 61 L. ed 667 (1917), emphasizes the distinction between a complete abrogation and a reasonable replacement at page 201.

> "Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast

---

[1] Appellee, in its footnote No. 9,suggests that the constitutional argument is premature based upon its assertion that it remains to be seen whether or not a tort remedy is available against the fellow employee Dennis Bruce. Interesting enough, appellee in its summary of argument, states that the exclusive remedy provision applies to bar recovery against the United States even where appellant has no tort remedy against the government driver. Any interpretation and construction of the Federal Drivers Act and the exclusive remedy provision of the F. E. C. A. must take into account the effect of the legislation upon the tort remedy against the federal driver. Attached hereto as appendix are certain correspondence illustrating the attempts by Dennis Bruce as well as appellant to have the state court action removed to the federal court.

> "industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. . . ."

In the instant case, any interpretation or construction barring appellant's recovery against the United States (applying the exclusivity provision of the F.E.C.A.) and against the fellow employee (applying the Federal Drivers Act) violates due process for the plain reason that no reasonably just equivalent is provided. See Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 72 L. ed 303, 48 S. Ct. 194 (1928). The constitutional violation is particularly insidious where there is attempt to abolish the judicial remedy in tort by implication.[2]

---

[2] For purpose of this case, it is not necessary to consider whether or not Congress would expressly enact legislation within the framework of the F.E.C.A. abolishing the common law remedy against fellow employees for the reason that it has not done so. In those states that have barred the common law action against both fellow employees and employer, it was accomplished by specifically expressed legislation in compensation statutes.

(continued on next page)

Concerning reference to the District Court decisions on the question presented, appellee ignores Green v. Short, Civil Action No. 1107 in and for the United States District Court for the Eastern District of Kentucky.[3] The precise question was before the Court in Green. It held that the F. E. C. A. exclusive remedy provision was not a bar to a proceeding against the United States for negligence of the government driver in the course and scope of his employment. Of remarkable significance in Green is the fact that the appellee dismissed its appeal from a judgment in favor of plaintiff and satisfied his judgment of $15,000.00. See Gilliam v. United States, 264 F. Supp. at 9.

In conclusion, the barring of judicial recovery to a government employee, made quadriplegic through the negligence of a fellow employee, is contrary to the purpose of the Federal Drivers Act which intended only to shift the financial responsibility from the negligent employee to the United States. Adoption of appellee's argument would nullify a traditional judicial remedy by implication, and it would make recovery depend upon the fortuitous circumstances of the type of accident involved. The optimal construction and interpretation - providing a reasonably just equivalent -

---

[2] continued:

See Allman v. Hanley, 302 F. 2d 588 (5th Cir. 1962). Appellee cites Silver v. Silver, 280 U.S. 117, 74 L. ed 221 (1929), but this opinion is not applicable because the constitutional review there was limited to the equal protection clause of the 14th Amendment and it involved the specifically expressed abolition of former rights.

[3] An unpublished opinion set out in length in Gilliam v. United States, 264 F. Supp. 7 (E.D. Ky. 1967).

would allow recovery against the United States in tort (by not applying the F. E. C. A.) while precluding recovery from the employee driver (by applying the Federal Drivers Act). Only this interpretation avoids an incongruous, absurd and unjust result.

We respectfully urge that the judgment of the District Court in favor of the appellee should be reversed.

Dated: San Francisco, California.

August 15, 1968

HOBERG, FINGER, BROWN & ABRAMSON

By JAMES D. MART,

Attorneys for Appellant.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

James D. Mart

JAMES D. MART
Attorney for Appellant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

MARY LINN being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of the City and County of San Francisco, and not a party to the within action. This affiant's business address is 703 Market Street, 18th floor, San Francisco, California. That affiant served a copy of the foregoing Brief by placing said copy in an envelope addressed to Morton Hollander and William Kanter, Appellate Section, Civil Division, Room 3706, U.S. Department of Justice, Washington 25, D.C. and Cecil F. Poole and Robert N. Ensign, 450 Golden Gate Avenue, San Francisco, California, which envelopes were then sealed and postage fully prepaid thereon, and thereafter was on August 16, 1968 deposited in the United States mail at San Francisco, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

Mary Linn

Subscribed and sworn to before me
this 15th day of August, 1968

Gloria M. Rivard
Notary Public
in and for the City and County of San
Francisco, State of California
My commission expires March 15, 1970

GLORIA M.

APPENDIX

ss ALL COMMUNICATIONS TO
TED STATES ATTORNEY
FER TO INITIALS AND NUMBER

RNE:mg

United States Department of Justice

UNITED STATES ATTORNEY
NORTHERN DISTRICT OF CALIFORNIA
16TH FLOOR FEDERAL BUILDING - BOX 36055
450 GOLDEN GATE AVENUE
SAN FRANCISCO 94102

RECEIVED
MAY 17 1967
Hoberg, Finger, Brown and Abramson
By.................................

May 16, 1967

Daniel J. McNamara, Esq.
Channell & McNamara
1626 Newell Avenue
Walnut Creek, California 94596

Re: Peter Anthony Noga v. United States
<u>Civil No. 45558 (N.D. Calif.)</u>

Dear Mr. McNamara:

We have discussed with the Attorney General's office your letter of April 27, 1967, demanding that the government take steps to remove the Superior Court action which you mention to the Federal District Court and substitute itself as a party defendant in place of Mr. Bruce.

Please be advised that the Attorney General will not certify that Mr. Bruce was acting within the scope of his employment at the time of the incident in question, and therefore no removal action will be taken.

You say in your letter that the government "has already accepted the fact that Mr. Noga and Mr. Bruce were both acting in the course and scope of their employment with the Federal Government." It is true, of course, that the Bureau of Employees' Compensation has determined that Mr. Noga was acting within the scope of his employment within the meaning of the FECA, but such determination does not settle the question of whether Mr. Bruce was acting within the scope of his employment within the meaning of the Tort Claims Act, as amended.

Very truly yours,

CECIL F. POOLE
United States Attorney

By: ROBERT N. ENSIGN
Assistant United States Attorney

AM R. CHANNELL
EL J. MCNAMARA
RY L. DUCEY

CHANNELL & MCNAMARA
1626 NEWELL AVENUE
WALNUT CREEK, CALIFORNIA 94596
TELEPHONE 939-5330
AREA CODE 415

MAILING ADDRESS:
P. O. BOX 486

May 22, 1967

United States Attorney
450 Golden Gate Avenue
San Francisco 94102

Attention: Robert N. Ensign
Assistant United States Attorney

Re: Peter Anthony Noga v. United States
Civil No. 45558 (N.D. Calif.)
RNE:mg

Gentlemen:

We wish to acknowledge receipt of Mr. Ensign's letter of May 16, 1967. We think the action of the Attorney General here completely overlooks the fact that there is already pending a suit against the United States under the Federal Tort Claims Act which Mr. Ensign is presently defending. By not removing the very same lawsuit against Mr. Bruce to the U.S. District Court where the same action is pending against the United States Government, the Attorney General is denying Mr. Bruce the protectio to which he is entitled under the Federal statutes. As you know the lawsuit against Mr. Bruce is in the amount of a million dollars and this action of the Federal Government could result in great prejudice financially to Mr. Bruce in the event of a judgment against him in the state court. Certainly no harm would be done by the removal of the action to the U. S. District Court. Very probably it would result in Mr. Bruce personally being protected from the possibility of any large judgment against him. As you know, he only has a $10,000.00 personal liability automobile policy.

It is therefore respectfully requested that the government reconsider this matter, and it is our obligation to remind you that we will hold the United States Government responsible for any detriment which may result to Mr. Bruce from the refusal of the Government to remove the suit now pending against Mr. Bruce fro the California state Court to the U. S. District Court.

Very truly yours,

CHANNELL & McNAMARA

By

DJM:jh
cc: Department of Justice
Washington, D.C. 20530
Attn: John G. Laughlin, Chief
Torts Section, Civil Division
DJ Ref: 157-11-1460

Hoberg, Finger, Brown & Abramson
703 Market Street
San Francisco, California

June 12, 1967

United States Attorney
450 Golden Gate Avenue
San Francisco, California

Attention: Robert N. Ensign,
Assistant U.S. Attorney

Re: Noga v. U.S.
Noga v. Dennis Bruce

Gentlemen:

As you know, this office represents Peter Noga for the severe personal injuries which rendered him a quadriplegic as a result of an accident on August 24, 1964.

We join in Mr. McNamara's letter of May 22, 1967, requesting that the Government reconsider its position with regard to filing a certification of course and scope of employment of its employee, Dennis Bruce, and removing the State Court action to the Federal Court. Both Peter Noga and Dennis Bruce were employees of the Department of Agriculture, Forest Service Bureau, at the time of the instant accident. Extensive evidence was presented before the Bureau of Employees Compensation on the question of whether or not they were acting in the course and scope of their employment at the time of the accident. Copies of the evidence and the legal argument are enclosed herewith. The deposition of Dennis Bruce will also be made available upon request if you have not yet obtained it.

Clearly, California substantive law is governing on the question of course and scope of employment. The California courts have recognized numerous exceptions to the "going and coming" rule which would include the'bunkhouse" rule and the "peculiar risk" rule, both of which apply to the instant fact situation. Under the circumstances, the U.S. Attorney's office is required by 28 USC 2679 to file a certification and remove the case to the Federal Court. Any other course of action would be grossly unjust and deny both Mr. Noga and Mr. Bruce their rights under Federal statutes.

In the event that the further preparation of this case reveals any facts negating course and scope of employment we would of course consent to the remanding of the case to the State Court upon such a determination by the court. Under those circumstances there can be no prejudice to the U.S. Government.

I would also like to remind you of the fact that Judge Wollenberg currently has under submission the legal question with regard to whether or not the United States is subject to liability even though Peter Noga received compensation as a result of the Federal Drivers Act. We have requested the court to withhold its decision on the United States' motion for summary judgment until such time as the removal of the State action can be completed. Our request was made for the purpose of saving the court as well as the various parties involved considerable time and expense and afford the opportunity for an answer to all the legal questions with all the issues before the court. We therefore urge you to take the necessary steps to effectuate the removal of the case to the United States District Court at your earliest convenience.

If you need any further facts bearing on the question of course and scope of employment, kindly advise and we will do all in our power to cooperate.

Yours very truly,

JAMES D. MART

JDM:sa
Enclosure

cc Department of Justice
Washington, D.C. 20503
Attn: John G. Laughlin, Chief Torts Section,
Civil Division, DJ Ref: 157-11-1460

Channell & McNamara
1626 Newell Avenue
Walnut Creek, California